FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC., *Petitioner,*

vs.

LARRY G. HARDISON, ET AL.

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ET AL., *Petitioners,*

vs.

LARRY G. HARDISON, ET AL.

On Writ of Certiorari To the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

NATHAN LEWIN
2555 M Street, N.W., Suite 500
Washington, D. C. 20037
SIDNEY KWESTEL
425 Park Avenue
New York, New York 10022
DENNIS RAPPS
66 Court Street
Brooklyn, New York 11201

Of Counsel:
HOWARD I. RHINE
HAROLD SKOVRONSKY

Attorneys for the National Jewish Commission on Law and Public Affairs ("COLPA"), Amicus Curiae

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BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

This brief is being filed with the consent of both parties in No. 75-1385, and with the consent of the respondent in No. 75-1126.[1]

It is joined by the following organizations: Agudath Israel of America, National Council of Young Israel, Rabbinical Council of America, and Union of Orthodox Jewish Congregations of America.

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[1] The petitioner in No. 75-1126 takes no position for or against our filing.

Agudath Israel of America is a national organization with congregational and individual members with branches in major Jewish population centers throughout the country. The National Council of Young Israel is a coordinating body for more than 100 affiliated Orthodox Jewish synagogues throughout the United States. The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world with a membership of more than 1000. The Union of Orthodox Jewish Congregations of America is a central coordinating body for approximately 3000 Orthodox Jewish congregations in the United States. All of these organizations have a vital concern for the protection of religious liberty, particularly the right of the observant to be gainfully employed.

INTEREST OF THE AMICUS

COLPA is a voluntary association of attorneys and social scientists organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The federal regulation and legislation challenged by petitioners—Section 1605.1 of the EEOC Regulation and Title VII of the Civil Rights Act of 1964, as amended in 1972 by the addition of Section 701(j)[2]—and similar State antidiscrimination laws have opened employment doors which had previously been closed to the Sabbath observer. Orthodox Jews, who are enjoined by Biblical

[2] References made to "Section 701(j)" in this brief should generally be taken to include 29 C.F.R. § 1605.1 (1975), which is the model on which the 1972 legislation was based and which, according to its legislative history, was meant to be enacted into law by Congress in 1972.

command, provided in Exodus and Deuteronomy, to "observe the Sabbath day and keep it holy" and "not [to] do any manner of work" on that day,[3] did not enjoy equal employment opportunities and were barred by employment policies from positions open to other individuals in our society. They were turned away from job after job and suffered economic hardship only because they steadfastly refused to violate the Biblical injunction against working on the Sabbath. Before the enactment of these laws, Sabbath observers were "free" to practice their religion, but this "freedom" often carried a severe penalty—inability to secure employment, and loss of jobs when their Sabbath observance became known.

With the announcement of Section 1605.1 and enactment of Section 701(j) (as well as similar State laws), there dawned a new era in which Sabbath observance was no longer the obstacle to employment it

[3] Observance of the Sabbath is considered a fundamental tenet of Judaism to the extent that the Talmud views it as equal to all the other commandments of the Torah. He who profaned the Sabbath was treated as an idolator (*Talmud Hullin* 5a) and was excluded from all of the privileges and rights accorded to observant Jews in the synagogue. Maimonides, in his Laws of the Sabbath, said:

> 1. Abstention from work on the seventh day of the week is a positive commandment, for Scripture says, *But on the seventh day thou shalt rest* (Exod. 23:12, 34:21). Consequently, whosoever does work on the seventh day disregards a positive commandment, and also transgresses a negative commandment, for Scripture says, *Thou shalt not do any manner of work* (Exod. 20:10, Deut. 5:14).
>
> What is the penalty for doing work? If one does work voluntarily and deliberately, he is liable to extirpation; if witnesses were present and a warning was given, he is liable to stoned; if he does work inadvertently, he is liable to a fixed sin offering.

once had been. Recognizing the crucial importance of employment opportunities for *all* Americans, the EEOC, and then the Congress, directed that an employer may not reject or terminate a Sabbath observer unless the employer establishes that his employment or retention would cause undue hardship to the operation of his business. The law made the phrase "equal employment opportunity" a reality for the religious observer in our society.

Hence the statute under attack is of vital importance to our community. Its salutary effect cannot be overemphasized. In the past ten years COLPA has assisted thousands of individuals in formally and informally enforcing their rights under this statute and under similar State antidiscrimination laws. These cases have involved the widest variety of employment. We can attest to the fact that countless individuals have become gainfully employed, enjoying equal benefits with all other citizens. We can also attest to the fact that in nearly all cases where "hardship" has initially been asserted by an employer, and where the Sabbath-observing employee has then been hired or retained because of the operation of law notwithstanding the expected "hardship," the reality has belied the anticipation. "Hardship" has too often proven to be a facile excuse for an unwillingness to undergo some slight inconvenience, or to depart from an inflexible policy, whose inflexibility is unsupported by genuine necessity—with devastating effect on the religious observer. Congress' enactment of this law, cast in terms of moderation, reasonableness and deference to actual proof of legitimate employer hardship, is a sound and sensible means of prohibiting thoughtless discrimination while acknowledging those instances

where real hardship exists. This Court should not overturn so considered and thoughtful a legislative judgment.

QUESTIONS PRESENTED

1. Whether the Establishment Clause of the First Amendment is violated by a federal interpretive regulation of the EEOC and a federal statute which require private employers to make "reasonable accommodation" to the mandated religious observances and practices of their employees and forbid rejections of such employees unless an employer can demonstrate that the observances create "undue hardship" on the conduct of the business.

2. Whether the "undue hardship" standard of Section 701(j) of the Civil Rights Act of 1964, as amended, was satisfied by proof that an employer might have to assign other employees with greater seniority to substitute for the religious observer or might have to pay overtime to a substitute employee.

ARGUMENT

Introduction

Certiorari was granted in this case after this Court, with only eight Justices participating, affirmed, by an equal division, the judgment of the Court of Appeals for the Sixth Circuit in *Cummins* v. *Parker Seal Co.*, 516 F.2d 544, affirmed as No. 75-478, 97 S. Ct. 342 (1976). The apparent disagreement here over the proper result to be reached in the *Cummins* case, as manifested during oral argument of that case on October 12, 1976, leads us to conclude that there is substantial misapprehension as to the meaning, purpose and effect of Section 701(j) of the Civil Rights Act of 1964, as amended in 1972, and that the parties and

amici (including ourselves) in the *Cummins* case failed to portray for the Court the actual operation of the law.

COLPA is the principal private voluntary organization in the United States that is involved, on a day-to-day basis, with the implementation of Section 701(j) and the various State statutes and regulations that rest on the principle enunciated in Section 701 (j). Our staff and volunteer attorneys have negotiated accommodations and have discussed with prospective and present employers of Sabbath-observers those undue hardships that exist or are feared in such an employment relationship. And we represent to this Court that the actual operation of such laws bears no resemblance to the speculative and hypothetical horrors that are paraded before the Court by those challenging the statute. In an Appendix to this brief, we survey the implementation of such a law in various industries in New York, where it has been fully and properly applied.

We will try in this brief to supplement the legal arguments we presented in our *Cummins* brief by responding specifically to six concerns voiced in the course of the argument in *Cummins*.

First, we discuss the relationship between Section 701(j) and the basic prohibition of the Title VII of the Civil Rights Act (Section 703(a)(1)) which forbids employment discrimination on account of religion. The attorneys for petitioners here apparently do not disagree with the observation of petitioner's counsel in *Cummins* that Congress could properly and legitimately forbid discrimination on account of religious belief in order to "purge channels of interstate commerce of irrational acts of employment which

tend to cut out of the job market certain people on the basis of irrational and irrelevant considerations."[4] We emphasize Mr. Justice White's observation, which is supported by the language, legislative history, and actual implementation of Section 701(j), that this law—which extends protection to religiously motivated conduct—was similarly intended by Congress "to clear interstate commerce of religious discrimination *which can reasonably be avoided,*"[5] and that it has that effect.

Second, we respectfully submit that Mr. Justice Powell's characterization of the statute as commanding "preferred treatment" for religionists and compelling employers "to accord a privilege, a benefit, to an employee because of his religious choice or preference"[6] does not correctly describe Section 701(j) or how it has been implemented. Section 701(j) accords no "preference" whatever. Moreover, those whose religions place them in a majority in this country enjoy certain prerogatives as employees simply because various aspects of the majority faith have, over the course of years, become secularized. Sunday laws and the celebration of Christmas are obvious examples of this development. Section 701(j) merely gives to minority religionists the same opportunities that our accepted mode of life gives to those of the majority faith.

Third, contrary to the suggestion made during oral argument of the *Cummins* case, this law does not give the employee protected by it a "free ride" at his em-

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[4] Transcript of Oral Argument, *Parker Seal Co.* v. *Cummins,* No. 75-478, p. 48.

[5] *Id.* at p. 48 (emphasis added).

[6] *Id.* at pp. 42-43.

ployer's expense.[7] The principle of "reasonable accommodation" means that an employee who seeks to be hired or retained even though his religious observance or practice conflicts with a general work-schedule imposed by his employer must be prepared to make some sacrifice, either in wages or in availability at other times.

Fourth, the two "burdens" imposed on an employer by Section 701(j)—the burden of arranging a reasonable accommodation and the burden of explaining why he is unable to do so if no accommodation is made—are not, as was suggested during the *Cummins* argument,[8] unfair shifts of "responsibility" to the employer of the consequences of an employee's personal faith. These are burdens that relate exclusively to *information* available principally to one of the two parties in the employer-employee relationship. The employee must cooperate in arriving at a working "accommodation"—as that word plainly manifests—but it is the employer who has the knowledge of the

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[7] The Deputy Solicitor General was asked (*id.* at p. 37):

> Suppose a man is being paid so much money to work six days a week during the whole year, and then he joins a church and he gets 52 days off with pay, just like that. Isn't that right?

[8] The Deputy Solicitor General was asked (*id.* at p. 36):

> What's your idea of whose burden this accommodating business is? Don't you think an employer—the man has been working for years on Saturday, then he comes in and says, "I'm sorry, I've joined the church and I can't work on Saturday any more." Now, does he have some job, some responsibility of suggesting how this can be done?
>
> MR. WALLACE: Well, he is not managing the plant. If you say——
>
> QUESTION: But he's the one who joined the church.
>
> MR. WALLACE: That is correct, but——
>
> QUESTION: He brought the issue up.

over-all availability of workers and who alone can explain if he is unable to devise an acceptable arrangement.

Fifth, the adjustment that must be made in a statutory accommodation by other employees—whether or not covered by a labor contract—has been magnified out of all proportion.[9] Employers customarily adjust work schedules to the medical, educational, and other personal needs of their employees; federal law now requires that such accommodation be made by federal contractors for those who have physical or mental impairments that qualify them as "handicapped." 29 U.S.C. § 793(a). Section 701(j) places the personal religious requirements of an observer on the same level as the personal medical requirements of a handicapped employee. And it subjects his or her coworkers to inconveniences similar in kind and degree to those they are expected to endure for a variety of other scheduling adjustments that are common to every substantial business operation.

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[9] Respondent's counsel in *Cummins* was asked (*id.* at p. 28):

> Didn't they also single out the others because of their beliefs in telling them they had to work overtime?

Shortly thereafter, he was asked (*id.* at p. 31):

> What you are saying suggests that this gentleman expected the whole establishment to revolve around him, to accommodate him, that other employees would have to be imposed upon, one way or another, in order to grant him total freedom from Saturday work. And you say that an employer must simply continue to tolerate that?

Petitioner's counsel also engaged in an extensive colloquy with Mr. Justice Powell as to whether a collective bargaining agreement is involved in any of the reported cases arising under the law (*id.* at pp. 46-47).

Sixth, the fact that the government is not the employer so that there is no immediate and direct involvement of the Free Exercise Clause in the employment relationship does not disable Congress from promoting "free exercise values" by appropriate legislation such as Section 701(j).[10] If Congress or a local legislature may "purge" major employment relationships of discrimination based on conditions that are not mentioned in the Constitution such as handicapped status, age, sex, or even prior criminal record, it would be anomalous if it could not do so when the activity being protected is so important to the national welfare that it is "within a specific prohibition of the Constitution, such as those of the first ten amendments." *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 n. 4 (1938).

I

THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT A LEGISLATURE FROM REQUIRING "REASONABLE ACCOMMODATION" BY A PRIVATE EMPLOYER TO HIS EMPLOYEES' RELIGIOUS OBSERVANCES

This case tests the validity of a reasoned legislative response to a serious economic and social problem

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[10] Petitioner's counsel in *Cummins* provided the following answer to a question asked by Mr. Justice Rehnquist during oral argument (*id.* at pp. 44-45):

> QUESTION: What if the Civil Service Commission had adopted precisely this sort of a regulation to be applicable to Government agencies? Would you say that violated the Establishment Clause?
>
> MR. BECKER: There, I think, once again, Mr. Justice Rehnquist, we would be in the posture that the Government, in order to avoid infringement upon free exercise, would have to make allowances. But that's because it's the Government which is the employer in that case.

that affects hundreds of thousands, and possibly millions, of Americans: What treatment should be afforded by substantial private employers to present or prospective employees whose religious convictions have an effect, be it small or large, on their ability to satisfy all formally stated conditions of employment? Congress considered this question in 1972, when it was evaluating the 1964 Civil Rights Act and adding to it amendments that ultimately took the form of the Equal Employment Opportunity Act of 1972. It decided that the proper response to this problem was to require "reasonable accommodation" on the part of employers because this would, in the language used to explain the general objectives of the law, "further promote equal employment opportunities for American workers." S. Rep. No. 92-681, 92d Cong., 2d Sess. (1972), p. 1. The requirement of "reasonable accommodation" is challenged in this case on constitutional grounds, but before we turn to a specific analysis of the constitutional contentions, we direct the Court's attention to the necessary consequence of accepting the petitioners' arguments.

If the petitioners are right in their Establishment Clause claim, it follows, we submit, that the resolution of these competing economic interests—*i.e.,* the interest of the employer in his "even-handed rule" and the interest of the religious employee in his job—can *never* be the subject of legislative action. If "reasonable accommodation" is an impermissible demand to make of an employer, it is hard to conceive how else Congress may deal with the problem. It must, then, leave it totally without legislative control.

Such an alternative places religious observance in a peculiarly vulnerable position that is at odds with the

"preferred" place that it occupies in our society. Congress may legislate to overcome irrational or unjustified impediments to the employment of racial minorities or those who are over-40 or those who are handicapped or have criminal records, but it may not, under the petitioners' approach, legislate to overcome unjustified barriers to the employment of religious observers. We think that such a limitation on legislative action would have been inconceivable to the draftsmen of the First Amendment and is totally at odds with the policies of the Religion Clauses.

To search for employment in an apologetic or self-demeaning manner is as degrading to a religious observer as it is to a black person or to a woman. The tenets the religionist holds sacred are as much a part of one's being as the color of one's skin or one's sex. And the pain of rejection for reasons of religious practice—unrelated to employment qualifications—is as stinging as that of any other form of irrational discrimination.

We are disturbed, therefore, by the tenor of the arguments that minority religionists do not merit the protections of the Civil Rights Act because religion is too subjective and ephemeral a quality, or because religion, unlike race or sex, is a self-imposed hardship. This is the insensitivity shown by one employer who glibly dismissed Sabbatarians as a "deviate religious practice." *The Wall Street Journal,* March 2, 1976, p. 5, cols. 1-2.

A. Section 701(j) Is a Means of Prohibiting Unjustified Religious Discrimination.

It seems to be generally agreed that Congress may constitutionally prohibit religious discrimination in

employment if the discrimination is directed at an employee's belief or mode of worship. Only conduct—affirmative observance or a refusal to act for reasons of religious scruple—is to be treated differently.[11] Section 701(j) is, we submit, a means of prohibiting discrimination when the purported reason therefor is an employee's conduct, but when the conduct really presents no objective basis for employment disqualification.

What does Section 701(j) do? It requires an employer who would refuse to hire or wishes to fire an employee to consider whether there is some way that the needs of the business may be reconciled with the religious needs of the employee. It says to an employer that he is discriminating on account of religion if he fails to hire or retain the observant employee unless he is able to specify a particular "undue hardship" to his business caused by "reasonable accommodation" to the observance.

There are, obviously, religious observances that have virtually no effect on an employer. Excusal of employees for a long lunch hour so they may attend full church services on Good Friday, permission to recite momentary brief prayers during the day, and authorization to wear a skullcap or other article of clothing required by religious belief are illustrative. Section

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[11] Many of the arguments made by petitioners on Establishment Clause grounds would apply to discrimination based on religious belief as well as observance and practice. For example, since Title VII prohibits discharge or refusal to hire based on *religious* belief, but not on *political* belief or *philosophical* belief, the prohibition would be a "breach of neutrality by discriminatory preference" or a "promotion of religious activity for its own sake." See Int'l Ass'n of Machinists Br., pp. 50-51.

701(j) disables an employer from terminating an employee because his conscience requires such minor adjustments. The reason why such termination would be improper is that the employer's assertion that the religious observance warrants dismissal is *unjustified*. What is really happening if an employee is dismissed for these reasons is that he is being arbitrarily treated —precisely because he adheres to a minority faith.

This case, along with those that have preceded it such as *Cummins* and *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971), concern observances which differ in degree, but not in kind, from those we have previously described. When a Sabbath-observer must, for reasons of conscience, be absent from his job between sundown on Friday and nightfall on Saturday, he obviously does not become incapable of performing any and every job that exists in our economy. Sabbath observers have filled and carried out with distinction some of the most responsible and demanding positions in private industry and government—including service as a federal judge and as law clerks to this Court. Whether the conscientious scruple against work on Saturday unduly impedes job performance must be judged by the individual task and its surrounding circumstances.

In its application to the case of the Sabbath-observer, Section 701(j) forces on the employer a genuine examination of his own business needs. It rejects superficially acceptable "even-handed" rules, and demands, instead, that the employer, and ultimately—if necessary—a court, decide whether there is substance to a claim that hiring or retention of the Sabbath observer will seriously impair a business operation.

This Court has noted, in another context, that the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939). Section 701(j) is a means of achieving this objective—or, in Mr. Justice White's words during the oral argument in *Cummins*—of "clear[ing] interstate commerce of religious discrimination which can reasonably be avoided."

B. Section 701(j) Does Not Accord an Impermissible "Preference" to Religion.

The principal argument made against the statute is that it grants "preferred treatment" to religious observers and thereby violates the Establishment Clause. See the question put by Mr. Justice Powell in the course of the *Cummins* argument.[12] This assertion grows out of the erroneous understanding of the law and its effect that has emerged from the briefs filed heretofore.

We demonstrate in the immediately preceding section that the objective of Section 701(j) is to bring reason to bear on particular employment decisions that

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[12] Mr. Justice Powell asked the Deputy Solicitor General (*id.* at pp. 42-43):

> What the [respondent] wants is not equal treatment. He wants preferred treatment. And it is a little curious to find the provision of the Statute, 701, that uses the term "discrimination" in a context that results in the argument being made here that because the employer accords equal treatment to Mr. Cummins the company that employs the employee is charged with discriminatory practice.
>
> The question I lead up to ask is: Whether or not in connection with your constitutional argument the employer is really not being compelled by law to accord a privilege, a benefit, to an employee because of his religious choice or preference?

affect religious observers. Because of the statute, religious unavailability on a particular day must be recognized as a legitimate ground for seeking accommodation; to this extent absence for reasons of conscience is given "preference" by the law over absence on less somber grounds. An employer may tell an employee who wants to go golfing on a Saturday morning that he must report for work instead, but he may not similarly sweep away the justification for unavailability given by a Sabbath-observer. But this is no more of a "preference" than a rule which would forbid a private employer from firing an employee who has a sound medical justification for a brief absence. Is the medical patient receiving a "preference" if, to prevent unjustified dismissals, a legislature were to require employees to engage in "reasonable accommodation" to the medical needs of their employees? Have the handicapped been given a "preference" by enactment of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, which requires substantial federal contractors to hire the handicapped?[13] The law on physical handicaps has been implemented by a regulation which, like Section 701(j), requires employers to engage in "reasonable accommodation" to the handicapped unless they can demonstrate that such accommodation "would impose an undue hardship on the conduct of the contractor's business." 41 CFR § 60-741.6(d).

Requiring very substantial reasons before an employment decision may be based on an employee's religious observance or practice is, for these reasons, not a "preference." It is neither more nor less than a recognition of the seriousness of such a ground of unavailability and an acknowledgment that it may not be brushed aside.

[13] Laws have also been enacted in 23 States protecting handicapped workers. In 19 of these States, the same prohibitions that apply to racial discrimination apply to discrimination against the handicapped. Schlei & Grossman, Employment Discrimination Law 226 nns. 38 & 39 (1976).

But our argument goes beyond this proposition. We believe that even if this approach can be said to constitute special treatment for religious observance, it is appropriate in these circumstances for the two reasons set out below:

(1) *Compensation for inequalities imposed upon minority faiths.*—The dilemma encountered by a Sabbath-observer whose employer insists that he be available on Saturdays is traceable, in no small part, to the majority's acceptance of Sunday as the most customary day of rest. And the selection of Sunday, as this Court has recognized, was originally "motivated by religious forces," with Sunday closing laws having "had their genesis in religion." *McGowan* v. *Maryland,* 366 U.S. 420, 431, 445 (1961). The law requiring a single day for uniform closing of businesses may now be justified on the secular grounds set out in *McGowan,* but no one can deny that the selection of Sunday as that day is attributable to its status as "a day of particular significance for the dominant Christian sects." 366 U.S. at 445.

The extent to which it has become universally accepted that labor cannot be mandated by a private employer on Sundays is demonstrated by a premise of this Court's opinion in *Sherbert* v. *Verner,* 374 U.S. 398 (1963). Explaining how South Carolina's unemployment compensation system discriminated against Sabbatarians, this Court quoted Section 64-4 of the South Carolina Code which provides that even in times of national emergency, when textile plants may

operate on Sundays, "no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious . . . objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner." This Court assumed, in deciding the *Sherbert* case, that such a law was plainly valid—even without provisions for "reasonable accommodation" or an exception for "undue hardship"—and would prevent discharges for refusals to work on Sundays. But this case concerns that very question, as applied to an adherent to a minority faith under a more general law that protects *all* religions, *all* days of rest, and *all* forms of observance.[14]

In this vein, Section 701(j) gives a Sabbatarian rights that compensate for the disability he suffers by not belonging to the majority faith.[15] In *Braunfeld* v. *Brown,* 366 U.S. 599 (1961), the entire Court recognized that a local jurisdiction would be acting more wisely (and, in the view of the *Braunfeld* dissenters, in a constitutionally mandated manner) if it placed Sabbatarian businessmen on a par with Sunday observers by granting legislative exemptions from Sunday Closing Laws. Section 701(j) is the equivalent

[14] The EEOC's implementation of the Civil Rights Act has extended the term "religion" to include any belief held with the strength of traditional religious convictions. See EEOC Dec No. 71-779, 1973 CCH EEOC Dec. 4304 (1970). Hence there is no possibility of discrimination among various faiths. See, *e.g., Welsh* v. *United States,* 398 U.S. 333 (1970). And the statute has been applied to protect atheists against "forced religious conformity" in private employment. *Young* v. *Southwestern Savings & Loan Ass'n,* 509 F.2d 140 (5th Cir. 1975).

[15] It is relevant to note, in this regard, that among eight holidays prescribed by the labor contract between TWA and the union, two are Christian religious holidays—Good Friday and Christmas Day. R. 216

of such exemptions *for employees.* Sunday Closing Laws affect the labor force indirectly, by compelling the owners of retail establishments—management—to remain closed on the day of rest selected by the majority faith. A Sunday Closing Law obviously cannot provide direct protection for the religious rights of a Sabbatarian employee; an exemption protects only the Sabbath-observing storeowner. But to give a minority employee the equal treatment to which he is entitled in fairness and justice (and, we believe, in the implementation of "free exercise values"), a law such as Section 701(j) is a necessity.

(2) *Special protection for religious liberty.*—Although we believe that this law is not a "preference" for the reasons stated above, we do not shy away from the proposition that the implementation of one's religious convictions is entitled to special protections—whether against state action or private infringement. Religious belief and practice occupy high places in our nation's scale of interests. One commentator has said that "religious or conscientious values frequently represent an idealism which serves a valuable function in society even though the idealist's conclusions may be rejected." Clark, *Guidelines for the Free Exercise Clause,* 83 Harv. L. Rev. 327, 337 (1969). The same writer has also observed that "violation of a man's religion or conscience often works an exceptional harm to him which, unless justified by the most stringent social needs, constitutes a moral wrong in and of itself . . . . [T]he cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect." *Ibid.*

In *Gillette* v. *United States,* 401 U.S. 437, 453-454 (1971), this Court spoke of the nation's "happy tra-

dition of avoiding unnecessary clashes with the dictates of conscience." On this ground, it concluded that "benevolence" in the area of religion was entirely consistent with the governing constitutional principle of "neutrality."

Religious concerns are unusual interests of extraordinary fragility. The framers of the Constitution were not indifferent to them nor were they neutral on the survival of religion. So perceptive an observer as Alexis de Tocqueville noted that while he could "not know whether all Americans have a sincere faith in their religion," he was "certain that they hold it to be indispensable to the maintenance of republican institutions." 1 Tocqueville, *Democracy in America* 316 (Vintage 1945). It is most unlikely, on this view of the importance of freedom of religion, that the framers intended to remove totally from the power of Congress any authority to protect the practice of religion from private inhibition or suppression. "Free exercise values" are, we believe, a proper subject for Congressional protection.

On this account, we believe that the Establishment Clause is not violated when Congress acts reasonably to *shield* religion and those who practice it from the effects of governmental or private action that would, absent such legislation, have the effect of infringing religious belief or practice. In such circumstances, the now-famous tripartite test of "purpose," "effect" and "entanglement" is simply inapplicable. When a governmental agency is granting benefits or establishing special programs—as it did in the cases involving released time, school prayers and bible reading, and financial assistance to private schools—the ultimate constitutional question is whether the Con-

stitution's ban against "sponsorship, financial support and active involvement" (*Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970)) has been violated by the form of the program or the regulation. But when Congress acts in a way that is merely defensive—that is designed to give religious belief and practice no more than breathing space in which to survive—the constitutional test should be whether the means is legitimately and rationally calculated to achieve the permissible end.

Leaving to one side the question of "state action" (which, for reasons stated below, pp. 30-31, *infra,* should not make a critical difference), the many instances in which this Court has upheld special legislative exemptions for religionists proves our point.[16] There seemed to be general agreement, for example, at the time of *Braunfeld* v. *Brown,* 366 U.S. 599 (1961), that an exemption for religious Sabbatarians from the operation of Sunday Closing Laws was constitutional, even though—by the Court's own reasoning—Sabbath-observers who keep their shops open on Sunday might thereby be given "an economic advantage over their competitors who must remain closed that day." 366 U.S. at 608-609.

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[16] Almost 60 years ago in the *Selective Draft Law Cases,* 245 U.S. 366, 389-390 (1918), Chief Justice White, referring to the conscientious objector provisions, said for a unanimous Court:

> And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof, repugnant to the 1st Amendment, resulted from the exemption clauses of the act to which we at the outset referred because we think its unsoundness is too apparent to require us to do more.

Various exemptions granted to religionists by court order or legislative action fall into the same category. In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), for example, this Court determined that an exemption from compensation ineligibility was constitutionally required for Sabbatarians who are unable to accept a job requiring Saturday work because of their conscientious scruples; the Court explicitly rejected the notion that such an exemption would be "fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina." 374 U.S. at 409. Indeed, even the late Mr. Justice Harlan, who dissented in *Sherbert,* objected only to the ruling that an exemption was *constitutionally mandated.* 374 U.S. at 420. He noted his view "that at least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant." 374 U.S. at 422.

A similar approach was followed in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). Upon concluding that the Free Exercise Clause of the First Amendment requires Wisconsin to exempt Amish parents from certain provisions of the State's compulsory education law, the Court disposed, in a footnote, of the kind of claim made here. 406 U.S. at 234-235, n. 223.[17]

[17] Legislative exemptions for religionists have also been frequently enacted and frequently sustained. The Prohibition Act contained an exemption for the use of sacramental wine (41 Stat. 308), and the constitutionality of such an exemption was sustained in *People* v. *Marquis,* 291 Ill. 121, 125 N.E. 757 (1919). The federal tax laws now contain an exemption from the payment of Social Security taxes for members of the Amish sect. 26 U.S.C. § 1402(h). Special statutory provisions for those having religious objections to abortions or other terminations of pregnancy (*e.g.,* N.Y. Civ. Rights Law § 79-i (McKinney Supp. 1975)) or for those having religious objections to autopsies (*e.g.,* Md. Code Ann., art. 22, § 6, as amended 1976) have recently been acted. See generally Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience,* 62 Ky. L.J. 377 (1974).

As to each of these exemptions, as with the prevalent Sabbatarian exemptions to Sunday laws (*e.g.,* 366 U.S. at 553-559), it could be argued—as it is being argued here—that the "primary purpose and effect" of the particular provisions is to aid religious practice. On its face, that is plainly true. Obviously, every protection for religious liberty somehow "aids" or "furthers" religious activity. "It cannot be ignored that the First Amendment itself contains a religious classification." *Welsh* v. *United States,* 398 U.S. 333, 372 (1970) (White, J., dissenting). But this Court recognized in *Yoder* that there is a constitutional difference between the active support that is prohibited by the Establishment Clause and the essentially defensive protection granted by statutes such as this one to permit religious observances to be performed without the kind of impediment that might be caused by adverse employment consequences.

For the reasons stated above, we believe that the constitutionality of laws such as Section 701(j) under the Establishment Clause should not be measured by the now-hallowed "tripartite" test applied when a form of state financial assistance to religion or an official religious exercise is authorized, sponsored or commanded by State law. Rather, the proper test should be whether the enacted legislation is a reasonable means of protecting the free exercise of religious beliefs and practices.

C. Section 701(j) Obligates an Employee to Cooperate with His Employer's Efforts to Make a "Reasonable Accommodation."

Nothing in the law or in its legislative history entitles an employee whose religious practice conflicts with an employer's general rule to demand unjustified benefits or preferences. The statute requires not merely accommodation; it qualifies the employer's duty with the word "reasonable." No employee may utilize his Sabbath observance as a way of getting "52 days off with pay." Nor may any employee refuse to cooperate with an employer's attempts at accommodation; he would, in such circumstances, be acting unreasonably. See Note, *Accommodation of an Employee's Religious Practices Under Title* VII, 1976 U. Ill. L. Forum 867, 876-879. But the interesting historical fact is that, notwithstanding the expressed fears that Section 701(j) might be used as a pretext by malingerers, we have found no reported cases in which the employee claiming rights under the Act refused to make himself available for work on other days or refused to accept a cut in pay if less working hours was the only available option.

D. Section 701(j) Imposes the Burden of Accommodating and Explaining on the Employer Because He Has the Facts.

Some members of this Court are apparently concerned over the fact that the Act assigns to the employer the "burdens" of accommodating to an employee's religious practice and of explaining, if no accommodation can be devised, why he is unable to do so. See note 8, *supra*. These are appropriate assignments of obligation based not on fault but the fact that only the employer has the *information* necessary to carry out these duties.

We have previously noted that the duty to accommodate requires the employer to make a genuine examination of his business operation to determine whether a Sabbath-observer, or any other religious practitioner, is truly unable to work at a particular position without "undue hardship" to the business. *Only* the employer has the total perspective to know what can be done in the way of work reassignment or adjustments in salary schedules. The employee in these cases may occasionally be in a position to suggest a working arrangement—and we agree that he is under an obligation to be cooperative in this manner—but it would be unfair to all parties concerned and would infringe on employer's management prerogatives to expect the employee to devise and implement the statutory accommodation. He is not privy to information the employer has on the availability of his employees, on the flexibility of his production schedule, on the economic consequences of various forms of readjustment, and on other minutiae of the business operation.

The employer's burden to explain is analogous to the duty an employer has under the sex discrimination provision of Title VII and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*, which requires him to prove that limiting a job to a particular sex or to a particular age bracket are "bona fide occupational qualifications." The courts have held that an employer must prove, in a sex discrimination case, that "the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); see *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969). The same principle has

been applied recently to age discrimination. *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976), and Section 701(j) imposes substantially the same burden in cases involving employees' religious practices and observances.

E. Other Employees—Even if Covered by a Labor Contract—Must Make Adjustments of the Kind Customary in an Employment Relationship.

It is argued in this case that an accommodation to the respondent's religious observance would have created a hardship for some non-Sabbatarian employee who would be required to work on the "undesired Saturday" (Int'l Ass'n of Machinists Br., p. 31). For reasons stated more fully in a later section of our brief (pp. 32-34, *infra*) and explored in the decision of the court of appeals (A. 256-259), we believe that an accommodation could have been worked out which would not have imposed any appreciable burden whatever on other employees at the TWA facility. And in many other situations where "hardship" is alleged, a close examination of the facts demonstrates that, without inconveniencing any other employee, an accommodation can be devised for the employer.[18]

We deal in this section of our brief, however, with the assumed premise that, in certain circumstances, an employee not regularly assigned to a Saturday shift and not voluntarily wishing such an assignment may have to substitute for a Sabbath-observer. The Constitution does not prevent Congress from requiring an employer to make such an involuntary assignment.

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[18] In *Cummins*, for example, the particular employee's presence on Saturday was unnecessary. The evidence indicated that the planning aspect of his supervisory duties could be accomplished with additional effort on Friday and that immediate supervision could be done by the employee overseeing the neighboring section.

We note initially, in this regard, that the disadvantage of "undesired Saturday" work may often be overcome by the greater disadvantage of far more undesirable *Sunday* work—which may clearly be assigned to the Sabbath-observer as part of any "reasonable accommodation." The employee who is asked to work on Saturdays in place of the Sabbatarian may, by the same token, be exempted from any Sunday assignments. Particularly in an operation which works on a regular seven-day week (such as the TWA overhaul base), it is highly improbable that employees would not prefer a Saturday to a Sunday assignment.

Moreover, the inconvenience of a transferred employee may be substantially mitigated by a payment of overtime wages. Whether the incremental salary must be paid by the Sabbatarian employee or by the employer (see A. 258) is not an issue that has to be resolved in this case. The point is that the seeming disadvantage assigned to the substitute for the Sabbath-observer is not all pain and no profit. Indeed, it is hard to believe that if an exemption from Sunday work or overtime wages were offered, the company would be unable to find anyone willing to take the Sabbatarian's Friday evening or Saturday shift.

Beyond these very practical considerations—which dispose, we submit, of an overwhelming majority of the cases—lies the ultimate theoretical question: Is the First Amendment violated if an employer must assign an unwilling non-Sabbatarian to fill in the Saturday shift of a religious observer? Surely far less, we submit, than it is violated by the assignment to military duty of a non-conscientious objector to take a place on the firing line that would otherwise be occupied by the religiously motivated pacifist. "Our happy tradition" of accommodating to conscientious scruples in a "Na-

tion of enormous heterogeneity in respect of political views, moral codes and religious persuasions" (*Gillette* v. *United States,* 401 U.S. 437, 453, 457 (1971)) leads us to sustain legislative imposition of some burdens on private citizens in order to enable religious belief and practice to survive. Occasional adjustments in work schedules are well within the range of such permissible burdens and are far less substantial than the burden that results from a religious exemption from duty in battle.

The nonreligious employee's interest in not working on Saturday does not take on added legal significance if it is part of a "seniority clause" in a collective-bargaining agreement. If an individual employee who works in an unorganized plant may be required to work involuntarily on Saturdays because a more junior employee has religious scruples against doing so, there is no reason why an employee in a plant covered by a labor contract may not be assigned a similar duty. Is the contract between the employer and the representative of a majority of its employees entitled to greater weight than the express or implied terms of an individual employment contract?

The proper rule of law is that the employer is not free to bind himself by *any* contract—whether in collective or individual form—which would appear to disable him from hiring or retaining any employees against whom he may not discriminate under the law. The proposition that an employer may be required to accommodate to a religious observance only if he is "contractually free" to do so (Int'l Ass'n of Machinists Br., p. 28), but that he and the union representing his employees may, by a written agreement, override that statutory directive is plainly wrong.

Courts have said on many occasions that "[t]he rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert." *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 799 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971); see, *e.g., Williams* v. *Norfolk & W. Ry.,* 530 F.2d 539 (4th Cir. 1975); *United States* v. *Navajo Freight Lines, Inc.,* 525 F.2d 1318, 1323-1324 (9th Cir. 1975). In *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 757-762 (1976), this Court reviewed the legislative history of Section 703(h) of the Civil Rights Act—which protects any "bona fide seniority or merit system"—and concluded that the statutory shield did not express Congress' wish "to modify or restrict relief otherwise appropriate." 424 U.S. at 761-762. A perceptive law review analysis of the problems arising in the implementation of Section 701(j) has observed that seniority systems "are less a source of religious discrimination than a limitation on methods of accommodation. . . ." Note, *Accommodation of an Employee's Religious Practices under Title VII,* 1976 Univ. of Ill. L. Forum 867, 887. Hence the principles announced in *Bowman* as applicable to relief for discrimination—rather than to whether illegal discrimination exists—should apply in this case, and the existence of a seniority system should afford no basis for denying to an observant employee the kind of accommodation that an employer might have available.

We note, finally, that the kind of schedule adjustment being required here is the sort that is customary in ordinary business operations. No one is being laid off or permanently reassigned in violation of a seniority clause. Rather, an employee who might be able to "bid" out of Saturday work is required to be available

on that day—much as he might be if the more junior employee were incapacitated or were otherwise unavailable for reasons that are generally accepted. Religious conviction is entitled to no less respect by employers and employees than medical necessity. And if Congress enacts into law the duty to accommodate to religious conviction, that legislative judgment is reasonable and permissible under the First Amendment.

F. Congress' Authority to Legislate is Not Affected by the Fact That Private, Rather Than Governmental, Discrimination Is Involved.

During the oral argument in *Cummins,* both the Court and counsel laid substantial stress on the difference between Section 701(j) which applies to private employees and a law that deals only with government employees. See note 10, supra. In fact, the Civil Service Commission has adopted a regulation (5 C.F.R. § 713.204(g)) that closely parallels Section 701(j), and that refers explicitly to the obligation to accommodate a Sabbath-observer by substituting for him "another qualified employee." The regulation declares that it is every government agency's duty to

> Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by substitution of another qualified employee, by a grant of leave, a change of a tour of duty, or other means) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so.

A law dealing with private employees, enacted in the exercise of Congress' authority under the Commerce Clause, is no less sound constitutionally than a law regulating government employees. To be sure, as petitioner's counsel emphasized in *Cummins,* the Free Exercise Clause operates directly against government agencies and they may, accordingly, have a heightened constitutional obligation to promote "free exercise values." On the other hand, the Establishment Clause is, by the same token, more directly involved when government employment is at issue. If a private employer shifts an unwilling employee to Saturday work as one possible accommodation to a Sabbath-observer, it is more difficult to maintain that the transfer is an "establishment" of the Sabbatarian's religion than if a government official makes such a decision. Consequently, to the same degree that a governmental accommodation may be deemed *more* permissible because cause of the Free Exercise Clause under the petitioner's constitutional theories, it should be *less* permissible under the Establishment Clause.

In fact, we submit, there is no substantial difference between government and private employment for purposes of legislative authority. Congress may act as freely to protect the free exercise of religion when it seeks, under the Commerce Clause, to remove religious belief or practice as a factor in private employment as when it attempts, under its authority over federal employment, to remove it as a factor in government hiring.

Moreover, totally private discrimination on the basis of age is now prohibited by federal law. See 29 U.S.C. §§ 621-634; Note, *The Age Discrimination in Employment Act of 1967,* 90 Harv. L. Rev. 380 (1976). In

Massachusetts Board of Retirement v. *Murgia,* 96 S. Ct. 2562 (1976), this Court held that advanced age does not define a "suspect class" under Equal Protection standards because there is no history of "purposeful unequal treatment" of the aged or subjection of the aged "to unique disabilities on the basis of stereotyped characteristics," and because the aged are not a " 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.' " 96 S. Ct. 2566-2567. Minority religions, on the other hand, do satisfy these standards. Consequently, Congress might even have authority under the Equal Protection principle, as incorporated into the Fifth Amendment, to protect minority religionists.

II

ACCOMMODATION WOULD HAVE IMPOSED NO "UNDUE HARDSHIP" ON THE EMPLOYER

We turn now, briefly, to the facts of this case. It involves an individual employee who "was willing to work any hours, take any combination of Days Off, and work any shift as long as he did not have to work between Sundown Friday and Sundown Saturday" (R. 36). Given this wide availability, the question is whether the employer and the union had a statutory obligation—singly or together—to work out some way under which his employment could continue.

The court of appeals suggested various accommodations—amply sustained by the record—that would have involved no or little inconvenience to other employees. *First,* the plaintiff could have been put on either a four-day or six-day week (A. 256). The first of these alternatives would have complied with the labor con-

tract; the second was objected to by the union because it was assertedly in violation of its 40-hour-per-week clause. *Second,* the employer could have covered plaintiff's shift by giving overtime pay to another employee who would be asked to fill in for the plaintiff (A. 256-257). This had been rejected because it might have involved an added expense. But the mere fact that an accommodation designed to eliminate religious discrimination would be more costly does not render it constitutionally impermissible. Eliminating discrimination in conditions of employment on account of sex might incidentally, for example, result in increased cost to the employer,[19] but that would not justify different treatment for male and female employees. The same rule should apply to employees of majority and minority faiths.

Moreover, the employer totally failed to consider whether the plaintiff might be required to take a salary adjustment in order to pay his substitute. Instead, the approach taken was a wooden one, in which the employer viewed itself as bound by all the literal terms of the labor contract and the union refused to be flexible in any way in its implementation.[20]

The plaintiff was, therefore, "whipsawed" between his employer and his union. The employer said that it would agree to anything that the plaintiff and the un-

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[19] In *General Electric Co.* v. *Gilbert,* 97 S. Ct. 401 (1976), for example, this Court noted, but did not approve of, a "cost-differential" defense. See 97 S. Ct. at 406 & n. 11.

[20] The union letter reporting on the plaintiff's difficulties explained the refusal to waive the 40-hour-a-week clause for the plaintiff's own work by saying (R. 36): "Of course, we know what would happen to our TWA-IAM Agreement if we made an exception to our '40 hours a week' clause in this case."

ion could work out, and the union shifted to the employer the duty of devising an accommodation.

This record concerns an employer who views the payment of overtime to a substitute as an unacceptable accommodation to an employee's religious beliefs and a union that views waiver of the overtime clause (even, apparently, when consented to by the employee) as an unacceptable course. Each of the parties to the agreement sticks to its letter, and the only one who loses is the employee who has sincere religious convictions and is prepared to work any day but his Sabbath.

This, we submit, is plainly not what was intended by the EEOC regulations and the Congressional definition in Section 701(j) of the Civil Rights Act of 1964, as added in 1972. Both provisions cast the test in terms of "undue hardship" not in terms of "added expense" or in terms of "departures from usual practices." The legal obligation cast upon a private employer and a union (both of whom are expressly covered by Title VII of the Act) is to engage in hiring practices which will not have the effect of excluding religious believers on account of their religious practices. The "one-two punch" of TWA's refusal to pay overtime to a substitute and the Union's refusal to waive the overtime clause (even as applied directly to the religious believer) is to exclude Sabbath observers from TWA's employment rolls. Congress has said this is permissible only if TWA and the Union are able to show specificially that there is "undue hardship" caused TWA's business by an accommodation. No such showing was made in this case.

What Congress and the EEOC doubtless contemplated when they included the "undue hardship" language in the statute and the regulations was the case

of an employer with a small number of employees, all or nearly all of whom are needed on weekends or on days when religious holidays may occur. It surely did not intend to exempt an employer with a mammoth staff of employees who establishes rigid rules regarding work schedules because individual adjustment is bothersome and then invokes the rigidity of his own rules as a basis for denying employment to a conscientious believer. If the excuse used here by TWA and the Union were legally sufficient, all large employers would be able to escape the effect of Section 701(j) by citing their religiously "neutral" rules. The very purpose of Section 701(j) was to provide protection for Sabbath-observers with respect to ostensibly "neutral" rules by requiring accommodation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

NATHAN LEWIN
2555 M Street, N.W., Suite 500
Washington, D. C. 20037

SIDNEY KWESTEL
425 Park Avenue
New York, New York 10022

DENNIS RAPPS
66 Court Street
Brooklyn, New York 11201

Of Counsel:
HOWARD I. RHINE
HAROLD SKOVRONSKY

Attorneys for the National Jewish Commission on Law and Public Affairs ("COLPA"), Amicus Curiae

APPENDIX

APPENDIX

COLPA Report on Implementation by New York State Division of Human Rights of "Reasonable Accommodation" Requirement in Three Industries with Time Demands*

Introduction

For many years, employment positions in industries operating on a six or seven-day a week basis have posed particular problems for Sabbath observers. Weekend work is never favored, and thus rotating shifts or requiring new employees to work weekends are common practices. The industries presenting the greatest difficulty are hospitals, public utilities and transportation systems, and large retail department stores. Through a series of proceedings brought in the New York State Division of Human Rights and discussions with employers a pattern has emerged indicating that the problem can be met if reasonable and genuine efforts are made by employers.**

A. *Hospitals*

The provision by hospitals of patient-care on a twenty-four hour a day, seven-day a week basis clearly requires personnel available at all times. For many years, hospital employment, in professional and non-professional capacities, was generally closed to Sabbath observers. As late as March 27, 1975, the New York State Division of Human Rights dismissed a Sabbath-observer complaint filed by a food service worker. (*Negron* v. *Queen's Children's Hos-*

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* This report was prepared by Dennis Rapps, Esq., Executive Director of the National Jewish Commission on Law and Public Affairs ("COLPA") with the assistance of Joseph S. Allerhand and Michael E. Zuller, second-year law students at Georgetown University Law Center.

** Agreements or documents referred to throughout this report are contained in the case files of the cases cited.

pital, New York State Division of Human Rights Case Nos. Ic-GCR-841-75, GCR-36613-75.) The ground on which the dismissal was based typifies the problem. Accepted was the unexamined premise that since service is provided on weekends, availability a. all times is a bona fide condition of employment. As the result of the case of *Eizik* v. *Good Samaritan Hospital,* Case No. CR-35677-74, New York State Division of Human Rights, Appeal No. 2594 New York State Human Rights Appeal Board, confirmed, Appellate Division, 2nd Dept., 386 N.Y. S. 2d 1016 (1976), hospitals are now required to demonstrate that the job-holder would be personally indispensible on the period of the observer's Sabbath to adequate patient care in order to justify refusal to hire an otherwise qualified observer. A typical new hiring policy of hospitals is contained in a conciliation agreement entered into in *Dornbush* v. *Long Island Jewish Hillside Medical Center,* Case Nos. Ie CR-1117-76, CR-40993-76, New York State Division of Human Rights, a case involving a nursing position. The pertinent provisions are:

> All applicants for employment will be considered strictly on the basis of their qualifications and without regard to their race, creed, color, national origin, age, sex, disability or marital status.
>
> All employees will be granted equal terms, conditions and privileges of employment without regard to their race, creed, color, national origin, age, sex, disability or marital status.
>
> Sabbath observers will be considered for all positions and, if hired, their sabbath observance accommodated unless (1) the position in question is one where the person holding such position must be personally available for duty whenever needed or (2) the personal presence of the person holding the position in question—or the people holding such class of positions—is regularly essential during the period of the person's sabbath or other holy day.

> Respondents will inform all supervisory personnel in writing that sabbath observers will be considered for all Registered Nurses positions and, if hired, will be accommodated as required by the Human Rights Law.

See also *Pollak* v. *Kings County Hospital Center,* Case No. CR-35841-74, New York State Division of Human Rights (dietitian); *Westrich* v. *Hospital for Cancer and Allied Diseases,* Case No. CR-35853-74, New York State Division og Human Rights, appeal pending (nursing student-aide); *Gross* v. *St. Vincent's Medical Center,* Case No. CR-34252-74, New York State Division of Human Rights, appeal pending (nurse); *Newman* v. *Columbia Presbyterian Hospital,* Case No. CR-2345-75, New York State Division of Human Rights (X-ray technician); *Fruchter* v. *New York Hospital,* Case No. CR-37892-75, New York State Division of Human Rights (nursing aide); *Hecker* v. *Kingsbrook Jewish Hospital Center,* CR-41495-76, New York State Division of Human Rights (office worker) and *Cruz* v. *Hillcrest General Hospital,* Case No. C-42644-76 New York State Division of Human Rights (nurse).

B. *Public Transportation and Utilities*

1. Public transportation agencies generally provide service seven day a week. Most employment in such industries is generally governed by collective-bargaining agreements regarding shift assignments. The New York City Transit Authority for many years asserted that it could not hire Sabbath observers because of these contracts. The Division took the position that, regardless of any contractual provision, New York law does not permit denial of employment opportunity to the observant unless the holder of a position applied for was personally essential during his or her Sabbath period. See *Waxstein* v. *New York City Transit Authority,* Case No. CR-27133-72, New York State Division of Human Rights, Appeal No. 1813, New York State Human Rights Appeal Board, *affirmed,* 360 N.Y.S. 2d

844 (2nd Dept. 1974), *leave to appeal dismissed*, 36 N.Y. 2d 872 (bus driver); *Gold* v. *New York City Transit Authority*, Case No. GCR-28863-72, New York State Division of Human Rights (token clerk); and *Kramer* v. *New York City Transit Authority*, Case No. GCR-31952-73, New York State Division of Human Rights (maintenance worker in power plant). As the result of such cases the Authority, with the concurrence of the involved unions, has adopted a policy that "no adverse action may be taken against any employee who in accordance with the law absents himself from work because of his observance of a sabbath or other holy day in accordance with the requirements of his religion." Further, canvass letters sent to persons eligible for employment and test announcements were revised to reflect this policy. See *Waxstein*, *Gold* and *Kramer*. See also *Clement* v. *New York City Transit Authority*, Case No. CR-37788-75, New York State Division of Human Rights.

2. Similarly, public utilities have policies of accommodation. AT&T "long lines" has a policy that "any applicants for employment who indicate that they are Sabbath Day observers and thus unable to work on the sabbath should not be refused employment for that reason and should be informed that, if hired, appropriate arrangements will be made . . ." See *Dembinsky* v. *American Telephone and Telegraph Co.*, Case No. CR-25640-71, New York State Division of Human Rights; *Smith* v. *New York Telephone Company*, Case No. CRF 25906-71, New York State Division of Human Rights and *Weil* v. *New York State Thruway Authority*, Case No. I-V-E C-1673-76E, New York State Division of Human Rights.

C. *Major Retail Stores*

One of the businest days for large department stores is Saturday—particularly if Sunday closing laws are in effect. Traditionally, stores have therefore asserted that they were justified in refusing employment to Sabbath-observ-

ers who would not work on Saturdays. In a number of cases this position was taken by employers but later there were concessions that adjustments could reasonably be made and policies of accommodation adopted. See *Assaraf* v. *Lord & Taylor*, Case No. CR-27961-72, New York State Division of Human Rights (beautician); *Gottesman* v. *Fooderama Supermarket, Inc.*, Case No. CR-28985-72, New York State Division of Human Rights (produce clerk); *Klein* v. *Tiffany & Co.*, Case No. CR-31781-73, New York State Division of Human Rights (stock clerk); *Kallus* v. *W & J Sloane Furniture*, Case No. CR-33573-74, New York State Division of Human Rights (personnel trainee). See also *Friedman* v. *Alexanders Department Store*, Case No. CR-30170-73, New York State Division of Human Rights (special need in particular case but generally accommodation is made).